

ADVISORY COMMITTEE ON RULES
September 12, 2007

Supreme Court Conference Room
Frank Rowe Kenison Supreme Court Building
Concord, New Hampshire

The meeting was called to order at 11:00 a.m.

The following Committee members were present:

Hon. Linda S. Dalianis
William F.J. Ardinger, Esquire
Mr. Robert L. Chase
Hon. R. Laurence Cullen
Mrs. Alice B. Guay
Hon. Richard A. Hampe
Martin P. Honigberg, Esquire
Hon. Paul E. McEachern
Jennifer L. Parent, Esquire
Emily G. Rice, Esquire
Raymond W. Taylor, Esquire

Also present were David S. Peck, Secretary to the Advisory Committee on Rules, and Margaret Haskett, staff.

With respect to Supreme Court Rules 37 and 37A, Judge Dalianis reported that in streamlining the process for handling complaints, the Supreme Court and Professional Conduct Committee made several changes to the PCC rules. One change gives the PCC's general counsel the authority to dismiss a claim without merit, subject to an appeal to the committee's complainant screening panel. As a result of comments made by a pro se litigant during the Committee's June public hearing, the Committee invited representatives from the PCC, Attorneys DeHart, Van Oot and McCafferty, to attend today's meeting to discuss the proposed amendments and comments.

Attorney Emily Rice joined the meeting; Attorney Ardinger recused himself.

Jim DeHart distributed a flow chart outlining the basic steps for dealing with grievance filings. He stated that once a grievance has been filed, a general counsel lawyer, who determines whether the grievance should be docketed, reviews it. If it is determined the case has no merit, the rule allows the general counsel lawyer to dismiss the claim. Attorney DeHart noted that since the revised rule has been in effect, 29 complaints have been dismissed and no motions for reconsideration have been filed. Explaining the screening committee's process for handling complaints, Attorney Van Oot noted that one change to the process now allows a serious misconduct case to be presented orally to the screening committee without first being investigated. It can then be passed immediately to Landya McCafferty.

In response to an inquiry about how screening committee members feel about the new dismissal process, Attorney Van Oot stated that members appear satisfied. It should be noted that while no motions for reconsideration have been filed by those denied under the new system, complainants were not specifically informed of their right to seek reconsideration in the letter sent to them dismissing their complaint. Following a lengthy discussion, and on motion of Attorney Honigberg, seconded by Attorney Rice, the Committee voted to recommend to the Supreme Court that said Supreme Court Rules 37 and 37A be adopted on a permanent basis except for the provisions allowing the general counsel to dismiss complaints. Those provisions will remain in effect on a temporary basis for an additional six months so that additional statistical information can be developed.

With respect to the suggestion made by Mr. Ginsberg during the Committee's June public hearing, on motion of Judge Dalianis, seconded by Judge Hampe, the

Committee voted to recommend to the Supreme Court that the standard of proof not be amended at this time.

Attorneys DeHart, Van Oot, and McCafferty left the meeting and Attorney Ardinger, recused from the discussion on Supreme Court Rules 37 and 37A, joined the meeting.

Judge Dalianis next informed the Committee of a matter pending before the Supreme Court. The defendant in a pending case filed a pleading contending that special rules governing death penalty proceedings are required by statute to be adopted. As a result of that filing, the Court invited the attorney general and the appellate defender to comment on whether such rules should be adopted and, if so, to submit proposed rules. While the attorney general argued no additional rules were necessary, she submitted proposed rules for the Court's consideration. Before recusing herself from the Committee's discussion of this item, Judge Dalianis appointed Attorney Ardinger to chair the discussion. Attorney Rice also recused herself from the discussion.

Following a lengthy discussion, the Committee appointed a subcommittee to assess whether a death penalty rule should be recommended and, if so, whether it should be included on the Committee's next public hearing agenda. The subcommittee members are: Attorney William Ardinger, Attorney Jennifer Parent, Attorney Martin Honigberg and Mrs. Alice Guay. The Committee agreed that if, after receiving the subcommittee's recommendation, it needs to meet to discuss a draft rule, a special meeting of the Committee will be held on October 17, 2007, at 12:00 p.m. in the Batchelder conference room.

Judge Cullen arrived during this discussion. Following the discussion, Attorney Honigberg left and Judge Dalianis and Attorney Rice rejoined the meeting.

The Committee then considered the minutes of the June 6, 2007 meeting and, on motion of Representative McEachern, seconded by Mrs. Guay, the Committee approved the minutes, as submitted.

With respect to action taken by the Supreme Court since the Committee's last meeting, David Peck reported that the Supreme Court adopted most of the recommendations contained in the Committee's 2007 annual report. One proposed rules change pertaining to alternative dispute resolution is still under consideration by the Court.

With reference to Supreme Court Rule 3, which governs appeals from divorce decrees, Judge Dalianis reported that because of concerns raised by court staff, the Court is considering reverting to the original language of the proposed amendment to this rule. On motion of Judge Hampe, seconded by Attorney Rice, the Committee voted that the rule does not need to go back through the Advisory Rules Committee process.

The Committee next discussed the status of items pending before it and the following action was taken:

Relative to the Rules of Criminal Procedure, David Peck distributed correspondence from Attorneys Christopher Keating and Richard Guerriero. Following discussion, and on motion of Attorney Rice, seconded by Representative McEachern, the Committee voted to further amend the Rules of Criminal Procedure as suggested by Attorneys Keating and Guerriero and to send said proposed amendments to the Committee's next public hearing.

Relative to system-wide guardian ad litem guidelines, following discussion, and on motion of Judge Dalianis, seconded by Attorney Rice, the Committee voted to ask Judge Hampe to review Chief Justice Lynn's comments contained in his July 13, 2007 letter to Judge Dalianis and to report back to the Committee at its December meeting.

Relative to amendments to Supreme Court Rule 42 pertaining to admission/bar requirements for pro bono attorneys, Attorney Ardinger distributed a draft rule pertaining to a limited certificate to practice law in New Hampshire to serve pro bono interests. Following discussion, and on motion of Judge Hampe, seconded by Attorney Rice, the Committee voted to further amend the draft rule submitted by Attorney Ardinger, as contained in Appendix A of these minutes, and to send said rule, Supreme Court Rule 42-D, to the Committee's next public hearing.

Relative to the report of the Committee on the Status of the Legal Profession, this matter was deferred until the next meeting.

Relative to the ABA Model Code of Judicial Conduct pertaining to provision of legal services following determination of major disaster, following discussion, Attorney Taylor agreed to draft a proposed rule for the Committee's consideration at its next meeting.

Relative to Supreme Court Rule 55 pertaining to the public protection fund, this matter was deferred until the next meeting so that Attorney Parent can discuss the matter with the Bar's Board of Governors.

Relative to Supreme Court Rule 38 pertaining to the Code of Judicial Conduct and a specific suggestion to review the definition of the word "judge," Judge Dalianis

reported that the subcommittee created to review the Code of Judicial Conduct will be meeting on September 14th.

Relative to an amendment to Supreme Court Rule 42 pertaining to admission requirements relating to bachelor degrees, following discussion, and on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to amend Supreme Court Rule 42(4)(a), as contained in Appendix B of these minutes, and to send said proposed rule to the Committee's next public hearing.

Relative to the Rules of Civil Procedure and Rules of Probate Administration, this matter was deferred until the Committee's next meeting.

The Committee next discussed new items and the following action was taken:

Relative to amendments to Supreme Court Rule 38, Canon 4(F) and Supreme Court Rule 38, Section B of the Application of the Code of Judicial Conduct pertaining to senior active status judges, which were adopted on a temporary basis by the Supreme Court, on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to send said amendments, contained in Appendices C and D of these minutes, to the Committee's next public hearing.

Relative to amendments to Superior Court Administrative Rule 1-5, Superior Court Administrative Rule 12-15 and Supreme Court Rule 48-C pertaining to mileage which were adopted by the Supreme Court on a temporary basis, on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to recommend to the Supreme Court that said amendments, as contained in Appendices E, F. and G of these minutes, be adopted on a permanent basis by technical amendment.

Relative to amendments to Supreme Court Rule 40 pertaining to procedures of the Judicial Conduct Committee, on motion of Attorney Ardinger, seconded by Judge

Dalianis, the Committee voted to send both proposals, contained in Appendix H of these minutes, to the Committee's next public hearing for consideration.

Relative to amendments to Supreme Court Rule 42 pertaining to admission to the bar, following discussion, and on motion of Judge Dalianis, seconded by Judge Cullen, the Committee voted to send the amendments to Supreme Court Rule 42(4)(c), as contained in Appendix I of these minutes, to the Committee's next public hearing. In addition, after further discussion, and on motion of Judge Dalianis, seconded by Judge Hampe, the Committee voted to send the proposed amendments to Supreme Court Rule 42(5)(h) and (j), as contained in Appendix J of these minutes, to the Committee's next public hearing.

Relative to a district court rule pertaining to post judgment attachments, following discussion, Judge Cullen agreed to check with Judge Kelly on whether such a rule is needed in the district court and to report back to this Committee at its next meeting.

David Peck distributed the proposed new family division rules submitted by Judge Kelly for the Committee's consideration. Judge Dalianis reported that at Judge Kelly's request the Supreme Court adopted these rules on a temporary basis and requested that this Committee consider whether they should be adopted on a permanent basis. Following discussion, and on motion of Judge Dalianis, seconded by Representative McEachern, the Committee voted to send said proposed new family division rules to the Committee's next public hearing.

The Committee scheduled its 2008 meetings as follows: March 12, June 11, September 10 and December 10 at 12:00 p.m. at the N.H. Supreme Court building.

No further business to come before the Committee, the meeting adjourned at
2:01 p.m.

Appendix A

Adopt new Supreme Court Rule 42-D as follows:

RULE 42-D. Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program

(I) The Supreme Court may issue a limited certificate to practice law in New Hampshire to any person who:

(a) is or was admitted to practice law in New Hampshire or any other state or territory of the United States or the District of Columbia and is retired from the active practice of law or is on inactive status (for purposes of this rule, "inactive" means any status other than "active");

(b) has not been retired or on inactive status for more than seven years;

(c) has been a member in good standing in each jurisdiction in which the retired or inactive attorney is or was admitted to practice law;

(d) has not been disciplined for professional misconduct in any jurisdiction within the past fifteen years and is not the subject of any pending disciplinary proceeding;

(e) is associated with an "approved legal services organization" as that term is defined below;

(f) performs all activities authorized by this Rule under the supervision of an attorney who is an active member of the New Hampshire Bar employed by, or participating as a volunteer for, an "approved legal services organization" as that term is defined below and who assumes professional responsibility for the conduct of the matter, litigation, or administrative proceeding in which the retired or inactive attorney participates; and

(g) agrees to abide by the New Hampshire Rules of Professional Conduct and all other rules governing the practice of law in this State and to submit to the jurisdiction of the Supreme Court for disciplinary purposes.

(II) For purposes of this Rule, the term "approved legal services organization" means a pro bono publico legal services program sponsored by a court-annexed program, a bar association, a New Hampshire law school, or a not-for-profit organization that provides legal services to persons of limited means and that receives funding from the federal Legal Services Corporation, the New Hampshire Bar

Foundation, and, in addition, shall include any not-for-profit legal services organization designated an approved legal services organization by the Supreme Court upon petition to the Supreme Court.

(III) The limited certificate issued under this Rule authorizes the retired or inactive attorney to provide legal services solely to clients approved to receive services from the approved legal services organization. The retired or inactive attorney issued a limited certificate may:

(a) appear in any court or before any tribunal in this State, provided that (i) the client consents, in writing, to that appearance, (ii) the supervising approved legal services organization has given written approval for the appearance, and (iii) such written consent and approval is filed with the court or tribunal prior to the appearance;

(b) prepare pleadings and other documents to be filed in any court or before any tribunal in this State on behalf of the client, provide that such pleadings shall also be signed by a supervising attorney of the approved legal services organization; and

(c) otherwise engage in the practice of law as is necessary for the representation of the client, but only after prior consultation with, and upon the express consent of, a supervising lawyer of the approved legal services organization.

(IV) An attorney desiring a limited certificate shall file with the Clerk of the Supreme Court an application on a form prescribed by the Supreme Court accompanied by:

(a) a certification by an approved legal services organization stating that:

(1) the retired or inactive attorney is currently associated with the approved legal services organization;

(2) an active member of the New Hampshire Bar employed by, or acting as a volunteer for, the approved legal services organization will assume the duties of the supervising attorney required by this Rule; and

(3) the retired or inactive attorney meets the requirements of section (I) of this Rule;

(b) a certificate of good standing from each jurisdiction in which the retired or inactive attorney is or was admitted to practice law; and

(c) a sworn statement by the retired or inactive attorney that the retired or inactive attorney:

(1) has read and is familiar with the New Hampshire Rules of Professional Conduct and all rules relating to the practice of law in this State and will abide by the provisions thereof; and

(2) will neither ask for nor receive compensation of any kind for the legal services rendered under this rule.

(V) The prohibition against compensation for the limited certificate attorney set forth in paragraph (IV)(c)(2) above shall not prevent the approved legal services assistance organization from reimbursing the limited certificate attorney for actual expenses incurred while rendering services hereunder, nor shall it prevent the approved legal services assistance organization from making such charges for its services as it may otherwise properly charge. The approved legal services assistance organization shall be entitled to receive all court-awarded attorney's fees for any representation rendered by the retired or inactive attorney.

(VI) Any questions concerning the fitness or qualifications of the retired or inactive attorney may be referred by the standing committee on character and fitness for a hearing and recommendation.

(VII) The limited certificate shall be revoked immediately upon:

(a) notice by the approved legal services assistance organization stating that the retired or inactive attorney has ceased to be associated with the approved legal services assistance organization. Such notice must be sent to the retired or inactive attorney and must be filed with the Clerk of the Supreme Court within five days after the association has ceased. The notice need not state a reason for the cessation of the association; or

(b) a determination by the Supreme Court, in its discretion, that the limited certificate should be revoked. Notice of the revocation shall be sent to the retired or inactive attorney and the approved legal services assistance organization within five days of the revocation.

(VIII) Upon the revocation of the limited certificate, the supervising attorney shall immediately file notice of the revocation in the official file of each matter pending before any court or tribunal in which the retired or inactive attorney was involved.

Appendix B

Amend Supreme Court Rule 42(4)(a) as follows (new language to be added is in

[bold and in brackets]; current language to be deleted is in ~~striketrough mode~~):

(4)(a) Every such applicant must furnish satisfactory proof that before beginning the study of law the applicant successfully completed at least three (3) years of work required for a bachelor's degree in an accredited college **[or received an equivalent education in the opinion of the court. An applicant who has not successfully completed at least three (3) years of work required for a bachelor's degree in an accredited college shall have the burden of proving that the requirements of this paragraph have been met. In addition to filing the petition and questionnaire for admission, any such applicant must submit information sufficient for the court to determine that the requirements of this paragraph have been met]**.

Appendix C

Supreme Court Rule 38, Canon 4(F) was amended on a temporary basis as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

F. Service as Arbitrator or Mediator.

[(1) Except as provided in subsection 2 below,] A [a] judge shall not act as an [provide services as a private] arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

[(2) A judge who is in senior active service pursuant to RSA 493-A:1 or who has reached age 70 but continues to sit as a judicial referee pursuant to RSA 493-A:1-a may serve as a private mediator or arbitrator, and may be privately compensated for such services in accordance with this subsection. To the extent the senior judge or judicial referee provides mediation services pursuant to Superior Court Rule 170 or 170-B, he or she shall comply with the certification requirements of those rules.

(a) A senior judge or judicial referee may be associated with entities that are solely engaged in offering mediation or other alternative dispute resolution services but that are not otherwise engaged in the practice of law. However, such senior judge or judicial referee shall not associate with a law firm, or advertise or solicit business in a manner that identifies his or her position as a senior active judge or judicial referee or prior service as a judge, but he or she may include the fact of prior service as a judge, along with other background and experience, in a resume or curriculum vitae.

(b) A senior judge or judicial referee who serves as a mediator or arbitrator shall disclose to the parties to the mediation or arbitration whether he or she has presided over a case involving any party to the mediation or arbitration within the past three years. A senior judge or judicial referee shall not solicit service as a mediator or arbitrator in any case in which he or she is or has presided or in which he or she has ruled upon any issues other than routine scheduling matters, but he or she may serve as a mediator or arbitrator in such a case if requested to do so by all parties to the case; provided, however, that once a

senior judge or judicial referee serves as a mediator or arbitrator in such a case, he or she shall not thereafter preside over any aspect of the case or rule upon any issue in the case in a judicial capacity.

(c) A senior judge or judicial referee shall disclose if he or she is being utilized or has been utilized as a mediator or arbitrator by any party, attorney or law firm involved in the case pending before the senior judge or judicial referee. Absent express consent from all parties, a senior judge or judicial referee is prohibited from presiding over any case involving any party, attorney or law firm that is utilizing or has utilized the senior judge or judicial referee as a mediator within the previous three years. A senior judge or judicial referee also shall disclose any negotiations or agreements for the provision of mediation or arbitration services between the senior judge or judicial referee and any of the parties or counsel to the case.

(3) The provisions of subsections (2)(b) and (2)(c) above do not apply when a judge, senior judge or judicial referee is performing mediation services for the judicial branch and without private compensation pursuant to Superior Court Rules 170 or 170-B.]

Appendix D

Supreme Court Rule 38, Section B of Application of the Code of Judicial Conduct, was amended on a temporary basis to read as follows (new material is in **[bold and in brackets]**; deleted material is in ~~striketrough~~ format):

B. All retired judges eligible for recall to judicial service
[who have elected to take senior active status or who wish to serve as judicial referees or temporary justices of the supreme court]
shall comply with the provisions of this Code governing part-time judges], except that they shall also comply with the provisions of Section 4F if they wish to serve as a private mediator or arbitrator for compensation. A retired judge who does not take senior active status and who does not desire to serve as a judicial referee or a temporary justice of the supreme court is not subject to Section 4F of this Code].

Appendix E

Superior Court Administrative Rule 1-5 was amended on a temporary basis by deleting said rule and replacing it with the following:

1-5.

Clerks of Court shall be reimbursed for mileage at the rate set by the supreme court by administrative order, and shall also be reimbursed for actual expenses.

Appendix F

Superior Court Administrative Rule 12-15 was amended on a temporary basis by deleting said rule and replacing it with the following:

12-15. Marital Masters not on circuit shall not be entitled to reimbursement for any mileage or meals not associated with an overnight stay on court business. Under this policy meals are reimbursed only if connected with an overnight stay; Marital Masters who have to travel to various courthouses are entitled to have mileage expense reimbursed. The mileage allowance shall be at the rate set by the supreme court by administrative order.

Appendix G

Supreme Court Rule 48-C was adopted on a temporary basis as follows:

RULE 48-C. MILEAGE REIMBURSEMENT

Notwithstanding anything in any rule, administrative order, letter, and memorandum to the contrary, whenever any judge, master, or employee of the judicial branch is entitled to reimbursement for mileage, the reimbursement shall be at the rate set by the supreme court by administrative order.

Appendix H

Amend Supreme Court Rule 40 in one of the following two alternative ways (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~striketrough mode~~):

Alternative No. 1

Adopt the following new subsection 13-A:

[(13-A) Expenses Relating to Discipline Enforcement:

In all cases in which discipline is imposed, including cases resolved by informal resolution or adjustment, all expenses incurred by the committee on judicial conduct in the investigation and enforcement of discipline may, in whole or in part, be assessed to a disciplined judge to the extent appropriate.]

Alternative No. 2

Amend the definition of "Informal resolution and adjustment", subsection 8(f), and subsection 12(c) as follows:

A. Definition of Informal resolution or adjustment

Informal resolution or adjustment - Discipline imposed by the committee when the committee determines that the judge has violated the Code of Judicial Conduct, but that the violation is not of a sufficiently serious nature to warrant the imposition of formal discipline by the court. Informal resolution may include admonishment of the judge, issuance of a reprimand, requiring corrective action, directing professional counseling or assistance, imposing conditions on the judge's conduct, **[assessing some or all of the expenses incurred by the committee on judicial conduct in the investigation and enforcement of discipline,]** or other similar remedies.

B. Subsection 8(f)

(f) During the course of its investigation, the committee may informally resolve the matter with the consent of the judge. Such informal resolution may take the form of written advice or admonishment, the requirement of remedial action, ~~or~~ the imposition of conditions, **[the assessment of some or all of the expenses incurred by the committee on judicial conduct in the investigation and enforcement of discipline,]** or any combination thereof. The committee may provide for monitoring or review by an administrative judge or other suitable person of any remedial action it may require or conditions it may impose in connection with an informal resolution or adjustment. The consent of the judge to informal resolution of the matter shall constitute a waiver of his or her right to a hearing.

C. Subsection 12(c)

(c) If the committee determines, by the affirmative vote of at least seven of its members, that there has been a violation of the Code of Judicial Conduct, but that the violation is not of a sufficiently serious nature to warrant the imposition of formal discipline by the supreme court, it shall dispose of the matter by informal resolution or adjustment. Such disposition may take the form of admonishing the judge, issuing a reprimand, requiring corrective action, directing professional counseling or assistance, imposing conditions on the judge's conduct, **[assessing some or all of the expenses incurred by the committee on judicial conduct in the investigation and enforcement of discipline,]** or other similar remedial action, or any combination of the foregoing. The committee may provide for monitoring or review by an administrative judge or other suitable person of any remedial action it may require or conditions it may impose in connection with an informal resolution or adjustment. If a proceeding is disposed of by informal resolution or adjustment pursuant to this subsection (c), the committee shall prepare a report of its findings and disposition, which shall be available for public inspection. Disclosure to the grievant shall be limited as provided in subsection (3)(c)(2) or subsection (3-a)(h) of this rule.

Appendix I

Amend Supreme Court Rule 42(4)(c) as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~striketrough mode~~):

(c) Notwithstanding the foregoing paragraph, a person who has graduated from a law school in an English-speaking, common law country and who has pursued a course of study substantially equivalent to that of a law school approved by the American Bar Association shall be eligible to apply for examination provided that such person is ~~(a)~~ a member in good standing of the bar of that country, ~~or (b)~~ **[and (a)]** the holder of a master's degree from a law school approved by the American Bar Association, or ~~(c)~~ **[(b)]** a member of the bar of one of the States of the United States who was admitted after examination and is in good standing. Any person who seeks admission to practice law in the State of New Hampshire who is a graduate of a law school in a foreign country shall have the burden of proving that the requirements of this paragraph have been met. In addition to filing the petition and questionnaire for admission, any foreign law school graduate seeking admission must file an affidavit, signed under oath, attesting that the requirements of this paragraph have been met and submitting information sufficient for the court to determine that the requirements have been met.

Appendix J

Amend Supreme Court Rule 42(5)(h) as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

(h) **[The petition and questionnaire filed by an applicant, with the exception of the applicant's name and address, all]** All matters referred to the committee for investigation**[, and all information relating to an applicant gathered by the committee]** shall be confidential. No member of the committee at any time, either while a member of the committee or thereafter, shall disclose any matter in any file, except at the request of the committee, or the supreme court or unless legally required to do so. All minutes or records circulated to members of the committee shall be kept confidential. All records relating to matters referred to the committee shall be retained in the committee's ~~permanent~~ files.

Also amend Supreme Court Rule 42(5)(j) as follows (new language to be added is in **[bold and in brackets]**; current language to be deleted is in ~~strikethrough mode~~):

(j) **[If the recommendation of the committee on character and fitness is in favor of admission, the court may accept the recommendation and grant the application for admission or decline to accept the recommendation. If the court determines that the recommendation of the committee should not be accepted, it shall either remand the matter to the committee for further investigation and consideration or refer the matter to a referee for an evidentiary hearing during which the applicant shall have the burden of proving his or her good moral character and fitness.]** If the recommendation of the committee on character and fitness is against admission, the report of the committee shall set forth the facts upon which the adverse recommendation is based and its reasons for rendering an adverse recommendation. The committee shall promptly notify the applicant about the adverse recommendation and shall give the applicant an opportunity to appear before it and to be fully informed of the matters reported to the court by the committee, and to answer or explain such matters.